In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 920

CLIFFORD A. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

An indictment returned in the United States District Court for the District of Columbia in January 1966 charged petitioner in three counts with perjury before the grand jury on March 17, 1965, in violation of 18 U.S.C. 1621. In October 1968, following an evidentiary hearing, the district court granted petitioner's motion to suppress evidence of conversations that had been monitored by the government with the assistance of Wayne Bromley, a participant in the conversations. 292 F. Supp. 1001 (Pet. App. 14a-33a). The United States appealed under 18 U.S.C. 3731 and on

September 30, 1970, the court of appeals reversed the district court (Pet. App. 1a-13a).

The facts are summarized in the opinions of the court of appeals (Pet. App. 2a-5a) and of the district court (Pet. App. 14a-33a). In brief, on March 17, 1965, petitioner appeared before a grand jury investigating Robert G. Baker, the former Secretary to the Majority Leader of the United States Senate.[1] Petitioner testified that his company, First Western Financial Corporation, had hired Wayne Bromley as an attorney and denied that he had used Bromley as a conduit to pay fees to Baker (A. 617-632). On the evening of March 22, 1965, petitioner, in a telephone call, related his grand jury testimony to Bromley. Following the call, Bromley, who had previously testified before the same grand jury that he had been Baker's conduit, contacted his lawyer and the latter reported the incident to the Justice Department attorneys conducting the grand jury investigation. Shortly after midnight of the next day, with the written consent of Bromley and the approval of his attorney, Bromley allowed the government to monitor a return telephone call to petitioner. During this conversation, Bromley indicated he expected to be called before the grand jury and said that "I am getting ready to go to the well again and I thought all that had stopped a year before." (A. 548). Petitioner said that he would "get this thing to you right away, so

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[1] See *Baker* v. *United States*, pending on petition for a writ of certiorari, No. 757, this Term.

you will know what you are paid for and when." (A. 555). Bromley also asked petitioner "if he could Thermofax my invoices to you, because at least I would like to see them." (A. 557). When Bromley asked Jones to refresh his memory about their arrangement, Jones said the deal was made in his office and that "[t]here was nobody else present, but the two of us, was there, just the two of us?" (A. 560). The following then ensued (A. 560):

> "Mr. Bromley: Cliff, are you asking me, or are you telling me.
>
> Mr. Jones: I am telling you."

In the following days, after further telephone conversations, a meeting between petitioner, Baker and Bromley in Los Angeles was arranged. (A. 586-596). Except for one unmonitored conversation, Bromley again permitted all these conversations to be monitored. On March 26, 1965, Bromley, carrying a transmitting device on his person, met Baker and petitioner at the latter's hotel suite. This conversation was overheard by government attorneys and agents in neighboring hotel rooms. (A. 564-584). The monitoring was done with the express authorization of the Attorney General and Bromley's formal consent.

The court of appeals properly reversed the order of the district court suppressing these conversations, which had been monitored some two years before this Court's decision in *Katz* v. *United States*, 389 U.S. 347. As the court below pointed out, the district court's opinion, which relies primarily on *Katz* v. *United States*, 389 U.S. 347, was issued prior to

Desist v. *United States*, 394 U.S. 244, which held *Katz* prospective only. The applicability of the principles of *Katz* to the monitoring of a conversation between a suspect and an informant by means of a transmitting device carried by the informant is presently before this Court in *United States* v. *White*, No. 13 this Term.[2]

Petitioner contends that "[i]rrespective of the decisions in *Katz* and *Desist*, the conduct of the Government in this case was shockingly improper." (Pet. 11). However, as the court of appeals correctly held, "the use of an informer has long been, and still is, regarded as an available weapon in the arsenal; and we cannot see that the facts of Bromley's cooperation in this case cast the Government in any peculiarly villainous role." (Pet. App. 12a). That the government suspected petitioner of already having committed perjury does not render the conduct reprehensible; the government had a duty to investigate whether petitioner or Bromley was telling the truth. See *Hoffa* v. *United States*, 385 U.S. 293, 310-312. The "two witness" rule in perjury cases only applies to what must be proved and does not limit the scope of a criminal investigation. See *Weiler* v. *United States*, 323 U.S. 606.

The claim that Bromley did not consent to the monitoring is answered in the opinion of the court of

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[2] As to the monitored telephone conversations sought to be suppressed, petitioner is fully chargeable with having assumed the obvious risk that the other party to conversations has given permission to a third party to listen to such conversations. See *Rathbun* v. *United States*, 355 U.S. 107.

appeals (Pet. App. 8a-9a). This does not, as petitioner contends, raise an issue not presented by *White*. Bromley, like the informer in *White*, may have been motivated to cooperate with the government by a desire to avoid prosecution but that does not make his authorization involuntary, especially where he acted on the advice of his attorney.[3]

The petition is, therefore, without merit. The Court may, however, wish to hold it until *White* is decided.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1970.

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[3] The claim that the evidence should be suppressed under the supervisory power is also fully answered by the court below (Pet. App. 10a-13a).

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